No. 75-1074

In the Supreme Court of the United States

OCTOBER TERM, 1975

TOM PICKETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1074

TOM PICKETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 53-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1975. On December 30, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to January 30, 1976, and the petition was filed on January 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's removal to the Southern District of West Virginia was proper.

2. Whether the trial court properly admitted in evidence a weapon seized at the time of petitioner's arrest.

3. Whether evidence of prior similar criminal acts was admissible.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conspiring to distribute marijuana, in violation of 21 U.S.C. 846, and on two counts of causing the interstate shipment of marijuana, in violation of 18 U.S.C. 1952(a)(3) and 2. He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a special parole term of two years on the conspiracy count. The court of appeals affirmed (Pet. App. 53-54).

The evidence showed that petitioner participated in a well-organized scheme to transport large quantities of Mexican marijuana from Tucson, Arizona, to Virginia and West Virginia, where it was distributed to others. Petitioner acted as the "Arizona connection." Others involved in the scheme were Calvin Thomas, who co-ordinated each shipment with petitioner; Patrick Johnson, who hired the drivers to transport the marijuana from Arizona to Virginia and West Virginia and directed its distribution there (Tr. 81); and Jessie Garrett and Terry Fink, who distributed the marijuana in West Virginia.[1]

[1]On September 26, 1974, petitioner, Johnson, Thomas and others were indicted in the United States District Court for the Southern District of West Virginia. Following a removal hearing on October 11, 1974, in the United States District Court for the District of Arizona, petitioner was removed to West Virginia. Johnson subsequently pleaded guilty and testified for the government; Thomas remained a fugitive throughout these proceedings. Garrett and Fink were named as unindicted co-conspirators and testified for the government at petitioner's trial.

In July of 1973, Calvin Thomas met with petitioner in Tucson, Arizona, in order to establish a source of Mexican marijuana (Tr. 68, 75-76). Once Thomas learned that petitioner could supply the desired quantities, he informed Patrick Johnson (Tr. 69, 75-76). Johnson in turn met with petitioner to discuss future transactions (Tr. 69, 78-79). Thomas remained in Arizona to co-ordinate with petitioner the delivery of marijuana from Mexico and to arrange for its loading into automobiles for delivery to Virginia and West Virginia. Approximately eleven loads of marijuana, each weighing about 250 to 300 pounds, were transported interstate by automobile (Tr. 96).

Each of the drivers hired to transport the marijuana customarily was paid $500 per trip (Tr. 344, 364, 504, 509). Petitioner frequently met with the drivers (Tr. 337, 360, 365, 467, 476, 505, 511, 585, 665-667) and sometimes discussed the purchase of marijuana with them (Tr. 592, 596-601, 669-674). Occasionally, the drivers purchased marijuana for their own use directly from petitioner (Tr. 602, 669-674). At times, petitioner suggested to co-conspirators Johnson and Thomas (Tr. 149-150) and to one of the drivers (Tr. 341, 348) the best routes to travel out of Arizona in order to avoid police detection.

In West Virginia, the marijuana was distributed by Garrett and Fink (Tr. 341-343, 661), both of whom knew petitioner was the "Arizona connection" for the marijuana (Tr. 542, 560, 571, 740-749). Fink testified about his numerous meetings with petitioner at which the marijuana scheme was discussed (Tr. 740-749).

ARGUMENT

1. Petitioner contends (Pet. 12-29) that his removal to the Southern District of West Virginia was improper

because he was not identified at the removal hearing as the person named in the indictment. He also claims that there was no venue in that district because he did not commit any crime there.

a. At the removal hearing, Fink testified that he was an unindicted co-conspirator in the West Virginia indictment and that he had testified before the grand jury there. He further stated that he was present at six meetings with petitioner in Tucson, Arizona, at which the co-conspirators discussed the delivery, quantity and price of the marijuana (H. Tr. 7-10).[2] At the first of these meetings, co-conspirator Thomas introduced Fink to petitioner, describing Fink as a driver who would transport marijuana to West Virginia (H. Tr. 9).

Since the indictment charged that Tom Pickette sold marijuana in Tucson, Arizona, to Calvin Thomas, Terry Fink and others and that the marijuana was transported by automobile to West Virginia and Virginia, the magistrate justifiably found (H. Tr. 20) on the basis of the evidence before him, that petitioner was the Tom Pickette named in the indictment. There was no occasion for Fink to express an opinion on that issue, because that was the ultimate question for the magistrate to decide (H. Tr. 10-11). See *Horner* v. *United States*, 143 U.S. 207, 215.

b. Contrary to petitioner's claim (Pet. 17) that he was not charged with committing any crime within the Southern District of West Virginia, the indictment charged him with conspiring to distribute marijuana in that district. Since venue in a criminal conspiracy prosecution lies in any district in which an overt act occurred (*Hyde*

[2]"H. Tr." refers to the transcript of the removal hearing held on October 11, 1974, in the District of Arizona.

v. *United States*, 225 U.S. 347, 367), the indictment was properly returned in the Southern District of West Virginia, because the evidence shows such an act took place there, namely, the delivery and distribution of marijuana (Tr. 82-99). See, *e.g.*, *United States* v. *Overshon*, 494 F.2d 894, 900 (C.A. 8), certiorari denied, 419 U.S. 853, 878. Moreover, since the proof under 18 U.S.C. 1952(a)(3) demonstrated that petitioner caused the interstate transportation of marijuana into the Southern District of West Virginia, venue was proper there under 18 U.S.C. 3237(a).

2. Petitioner argues (Pet. 29-38) that his co-defendant's gun, which was introduced in evidence, was seized during an unlawful search of an apartment which they shared.

Agents of the Drug Enforcement Administration received information from their office in Charleston, West Virginia, that arrest warrants were outstanding for petitioner and co-defendant Stanley Desisto (Tr. 419, 778-779). Pursuant to this information, they went to an apartment in Tucson, Arizona, where petitioner and Desisto were believed to be residing with a third person (Tr. 382-383, 423, 779). Agent William Hare, who was dressed in civilian clothes (Tr. 421-422), knocked on the front door of the apartment while another agent watched the back entrance.

When petitioner answered the door, Agent Hare, who did not know him, asked whether Mr. Pickette (petitioner) was there (Tr. 384, 408, 780). A few moments later co-defendant Desisto, whom Hare recognized,[3] appeared at the door and pointed a gun at the agent's head (Tr. 382, 384, 388-389, 425). Hare immediately

[3]In January of 1972, Desisto had been arrested by federal narcotics agents. Agent Hare recognized him from a photograph which he had seen at that time (Tr. 382).

identified himself as a federal agent (Tr. 384, 781). Petitioner and Desisto thereupon pushed the door shut and turned out the lights in the apartment (Tr. 385, 781). At that point, the agents summoned help.

Fifteen minutes later, local police officials and a police helicopter arrived (Tr. 782). Agent Hare yelled numerous warnings to petitioner and Desisto that they were federal agents and had warrants for their arrests (Tr. 844). When the agents received no response, they forcibly entered the apartment. Petitioner and Desisto fled out the back entrance and were arrested (Tr. 386, 782).

At the time of arrest, an agent advised petitioner and Desisto of their rights (Tr. 411-412, 821-822). Both defendants were searched and neither was armed (Tr. 386). The apartment was searched to determine whether a third person was present and armed (Tr. 386). Neither a third person nor the gun that Desisto had pointed at Agent Hare was found. Desisto was then asked where the gun was (Tr. 386-387, 787). Desisto told the agent that the gun was hidden in a skylight in the kitchen (Tr. 387). The agent went back into the apartment and seized the gun from the skylight (Tr. 387-388).[4]

Since the agents had information that a third person might be residing with petitioner and Desisto, and since the agents knew that Desisto had been armed only moments before the arrest, they reasonably concluded that immediate entry was necessary to determine whether that third person, who might be armed, was present. See, *e.g.*, *United States* v. *Holiday*, 457 F.2d 912

[4]The agent found two guns (Tr. 388). The court permitted the government to disclose to the jury that Desisto was armed when the agents arrived at his apartment and that the gun was found there, but it further instructed the prosecution not to introduce any testimony about the second gun (Tr. 439).

(C.A. 3), certiorari denied, 409 U.S. 913. " '[T]he exigencies of the situation made that course [of conduct] imperative' " and reasonable for the agents' own protection. *Warden* v. *Hayden*, 387 U.S. 294, 298-299, quoting *McDonald* v. *United States*, 335 U.S. 451, 456.

Nor did the exigencies of the situation cease once the initial search had indicated that apparently there was no one else in the apartment. Since neither defendant had the gun on his person, the agents knew that it had been hidden somewhere in the apartment and that it therefore continued to present a threat to their safety.[5] In these circumstances, it was reasonable for one of the agents to ask Desisto where he had hidden the gun and to seize it when its location was disclosed.

Moreover, Desisto consented to the seizure. He had been given *Miranda* warnings and responded that he understood; he also was aware that the agents had been unable to locate the weapon. Yet in response to a simple non-coercive question, he disclosed the location of the gun. In the "totality of all the circumstances" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227), his consent was voluntary, and the mere fact that he was in custody did not vitiate that voluntary consent. *United States* v. *Watson*, No. 74-538, decided January 26, 1976, slip op. at 13.

Furthermore, the gun was evidence of a crime that had been committed only moments before. As the court of appeals correctly found (Pet. App. 54), the gun "had been brandished by one of the defendants moments before

[5]Although a third person was not found in the apartment, the agents were uncertain whether petitioner and Desisto lived there alone. Since there had been a ten to fifteen minute delay between the time Agent Hare identified himself as a federal agent and their entry into the apartment, Desisto had sufficient opportunity to contact that third person, or even someone else.

in an attempt to prevent entry to the premises." Notwithstanding Desisto's apparent lack of knowledge that Agent Hare was a federal agent, his act of pointing a weapon at Hare's head was an assault on a federal officer. *United States* v. *Feola*, 420 U.S. 671. In these circumstances, once Desisto disclosed the gun's location, it was reasonable for the agents to seize the gun immediately without a warrant. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 51-52.[6]

3. The trial court properly admitted evidence concerning prior similar criminal activity, specifically, a purchase of cocaine from petitioner (Tr. 104, 154-155), a similar purchase by co-conspirator Fink and petitioner from an unnamed Mexican (Tr. 543, 748-749) and a purchase of cocaine by one of the hired drivers from a Mexican at petitioner's apartment (Tr. 588-589). The court carefully instructed the jury that these similar acts were admissible only to show intent (Tr. 918, 927-929).

Petitioner concedes (Pet. 39) that evidence of similar criminal activity is admissible "to prove some element of the crime presently charged," such as intent. But he contends that the evidence here was inadmissible because it was not "plain, clear and convincing" (Pet. 41) and the prejudicial effect of this evidence "clearly outweighed any need for its introduction" (Pet. 42).

The admissibility of evidence of prior crimes is within the trial court's discretion. See, *e.g.*, *United States* v.

---

[6]In any event, even if the trial court erred in admitting the gun and testimony about it into evidence, it was harmless error. *Chapman* v. *California*, 386 U.S. 18, 21-24. The evidence, wholly independent of the gun, that petitioner participated in a conspiracy to distribute marijuna and caused its interstate shipment was, as the court of appeals correctly found (Pet. App. 54), overwhelming.

Crockett, 514 F. 2d 64, 72 (C.A. 5). There was no abuse of discretion here. The prior cocaine purchases involved participants in the conspiracy charged here and, in fact, occurred during that conspiracy. Evidence of each transaction was "clear and convincing" in that either the witness himself had made the purchase or a fellow co-conspirator, who had purchased the drug, related that information to the witness. These witnesses not only testified that the purchases had been made, but they also stated the persons involved (Tr. 104, 543, 588, 749), the place of the transaction (Tr. 103-104, 543, 588, 748), and, on at least one occasion, the purchase price (Tr. 749).[7] Furthermore, the trial court did not abuse its "wide range of discretion" in concluding that the probative value of the evidence outweighed its inherent

---

Petitioner's assertion (Pet. 41) that the evidence was not "clear and convincing" because the record does not show whether the prior acts were specific intent crimes is insubstantial. The sale or purchase of a controlled substance proscribed by 21 U.S.C. 841(a)(1), or aiding and abetting such a transaction, requires the same type of intent as the crime charged here—conspiring to distribute a controlled substance in violation of 21 U.S.C. 846. *Ingram* v. *United States*, 360 U.S. 672, 678.

Petitioner's reliance on *United States* v. *San Martin*, 505 F. 2d 918 (C.A. 5), to show that the evidence of the prior criminal activity was insufficient "because only the fact of the offenses and not their circumstances were introduced" (Pet. 41) is misplaced. In *San Martin* the issue was whether the defendant intended to assault an FBI agent, or whether he did so accidentally. The court emphasized that "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent." *Id.* at 923. Accordingly, the court held that the mere recital that a conviction occurred, without setting forth the circumstances involved, had more to do with the defendant's overall disposition or character than with the type of intent necessary to commit the offense charged. Here, in contrast, the intent involved a conspiracy to distribute narcotics and the interstate transportation of the drug, and the circumstances of the prior criminal acts were stated.

prejudicial effects. *United States* v. *Crockett, supra,* 514 F. 2d at 72.

4. Finally, petitioner contends (Pet. 43-44) that the evidence was insufficient to sustain his conviction, because, he says, only a buyer-seller relationship, not a conspiratorial agreement, existed between him and his co-defendants. He concedes (Pet. 44) that the evidence against his co-defendants was "overwhelming."[8] However, viewing the evidence most favorably to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), it supported the jury's verdict against petitioner on each of the three counts; indeed, the petitioner's involvement in the conspiracy, like that of his co-defendants, was "overwhelming."

The conspirators were involved in a large scale distribution scheme, a necessary concomitant of which was a source of Mexican marijuana, which petitioner provided. After meetings with co-conspirators Thomas and Johnson in July of 1973, he agreed to supply the marijuana. His relationship to and interest in the scheme did not cease after a single sale but extended over a series of transactions. Petitioner maintained contact with his fellow co-conspirators throughout the conspiracy and personally met with them on numerous occasions to discuss the availability and price of large quantities of marijuana.

Thus, petitioner participated in an integral and active way in the scheme. He "intended to participate in it"

---

[8]Relying on *United States* v. *Varelli,* 407 F.2d 735, 747 (C.A. 7), appeal after remand, 452 F.2d 193, certiorari denied *sub nom. Saletko* v. *United States,* 405 U.S. 1040, petitioner contends (Pet. 43-44) that his conviction must be reversed because of a prejudicial transference of his co-defendants' "overwhelming" guilt to him. The prejudice arose in *Varelli,* however, because of a variance in the number of conspiracies charged and those proven. That situation did not exist here.

(*United States* v. *Cirillo,* 499 F.2d 872, 883 (C.A. 2), certiorari denied, 419 U.S. 1056), sought "to further its purposes" (*United States* v. *Cianchetti,* 315 F.2d 584, 588 (C.A. 2)) and had a stake in its outcome.

Moreover, contrary to petitioner's contention (Pet. 23-26), the evidence showed that he aided and abetted and caused the use of interstate commerce to carry out the distribution scheme, in violation of 18 U.S.C. 1952(a)(3). Petitioner was aware that the marijuana would travel interstate by automobile, and he coordinated with co-conspirator Thomas the importation of the marijuana and its loading into automobiles for shipment to Virginia and West Virginia. He also advised the participants about safe routes to take out of Arizona in order to avoid detection by the police. Petitioner's interest in the success of the venture did not, as he contends (Pet. 26), terminate at the conclusion of each sale.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys.

APRIL 1976.

DOJ-1976-04